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Attorneys for Third-Party Defendant
PERFORMANCE CONTRACTING, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA for the use and benefit of WEBCOR CONSTRUCTION, INC. dba WEBCOR BUILDERS, and WEBCOR CONSTRUCTION, INC. dba WEBCOR BUILDERS,

Plaintiffs,

vs.

DICK/MORGANTI, a joint venture; DICK CORPORATION; THE MORGANTI GROUP; AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; and DOES 1-10, inclusive

Defendants.

AMERICAN CASUALTY COMPANY OF
READING, PA; NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH,
PA.

Third-Party Plaintiffs.

Case No. 3:07-CV-02564-CRB

**DECLARATION OF MATTHEW E.
MCCABE IN SUPPORT OF
PERFORMANCE CONTRACTING,
INC.'S OPPOSITION TO MOTION
TO STAY PROCEEDINGS**

DATE: October 19, 2007

TIME: 10:00 a.m.

JUDGE: Hon. Charles R. Breyer
(Courtroom 8)

VS.

BOYETT CONSTRUCTION, INC., a California corporation; MARELICH MECHANICAL CO., INC., a California corporation; PERFORMANCE CONTRACTING GROUP, INC. dba PERFORMANCE CONTRACTING, INC., a Delaware corporation; PERMASTEELISA GROUP USA HOLDINGS CORP., a Delaware corporation fdba PERMASTEELIS CLADDING TECHNOLOGIES L.P., a Delaware limited partnership, fdba PERMASTEELISA CLADDING TECHNOLOGIES, LTD.; ROSENDIN ELECTRIC, INC., a California corporation; THIRD PARTY DOE DEFENDANTS 1 THROUGH 20.

Third Party Defendants.

I, Matthew E. McCabe, declare as follows:

1. I am a member of the State Bar of California and am associated with the law firm
Otis Canli and Iriki, LLP, the attorneys of record for third-party defendant Performance
Contracting, Inc. ("PCI") in the above-captioned case. If called upon, I could and would
competently testify to the matters stated herein

2. The deposition of Fred Daven, was taken on July 27, 2006 in San Francisco Superior Court Case No. CGC 06-450903. Mr. Daven oversaw the construction of the new GSA Federal Building located at 7th and Mission Streets on behalf of Dick/Morganti “D/M”). See pages 6-9 of the Daven deposition transcript, attached hereto as Exhibit 1.

3. At his deposition Mr. Daven authenticated an email dated August 3, 2005 that he sent to Dick Company employees W. L. Higgins, Dan Arana, and J. Dravet. A true and correct copy of that email (which is Exhibit 8 to the deposition transcript) is attached hereto as Exhibit 2. A true and correct copy of the deposition testimony authenticating the email is attached hereto as Exhibit 3. In the email Mr. Daven stated that “[b]ecause we didn’t quite handle things correctly

1 at the start of the project and because the subs are financing the project, their taste has really
2 soured."

3 4. Attached hereto as Exhibit 4 are pages 39-40 of the Daven transcript. In these
4 pages Mr. Daven testified that he had been working on D/M's claim to the GSA since September
5 2005 until the time he left the company in June 2006.

6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct. Executed on September 20, 2007, at San Francisco, California.
8

9 
10 Matthew E. McCabe

EXHIBIT 1

A006382
FRED DAVEN - July 27, 2006

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
3
4 - - -

5 PERFORMANCE CONTRACTING, INC.,)
6)
7 Plaintiff,)
8)
9 vs.) No. CGC 06-450903
10)
11 DICK/MORGANTI, a joint venture,)
12 DICK CORPORATION; THE MORGANTI)
13 GROUP, INC.; and DOES 1 through 50,)
14 inclusive,)
15)
16 Defendants.)
17 _____)

18 DEPOSITION OF

19 FRED DAVEN

20 SAN FRANCISCO, CALIFORNIA

21 THURSDAY, JULY 27, 2006

22 ATKINSON-BAKER, INC.

23 COURT REPORTERS

24 (800) 288-3376

25 www.depo.com

REPORTED BY: PATRICIA SEGOVIA-VALDES, CSR NO. 8416

FILE NO.: A006382

A006382
FRED DAVEN - July 27, 2006

Page 2		Page 4	
1	IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA	1	I N D E X
2	IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO	2	WITNESS: FRED DAVEN
3		3	PAGE
4	---	4	EXAMINATION BY MR. STEVEN L. IRIKI
5	PERFORMANCE CONTRACTING, INC.,)	5	6
6	Plaintiff,)	6	
7	vs.) No. CGC 06-450903	7	EXHIBITS:
8	DICK/MORGANTI, a joint venture;)	8	1 Subcontract Agreement GSA Project
9	DICK CORPORATION; THE MORGANTI)	9	2 Letter from Jim Strout to Fred Daven
10	GROUP, INC.; and DOES 1 through 50,)	10	and James Dravet dated June 13,
11	inclusive,)	11	2005 20
12)	12	3 Letter from Fred Daven to John Nolte
13	Defendants.)	13	dated July 7, 2005 22
14		14	4 String of e-mails. Last e-mail from
15	Deposition of FRED DAVEN, taken on behalf of	15	Fred Daven to Jim Strout dated
16	Plaintiff, at Otis Canli & Iriki, 180 Montgomery Street,	16	July 12, 2005 24
17	Suite 1240, San Francisco, California 94104, commencing	17	5 Letter from Roger Wiesnoski to Fred
18	at 1:30, p.m., Thursday, July 27, 2006, before PATRICIA	18	Daven dated July 13, 2005 27
19	SEGOVIA-VALDES, CSR NO. 8416.	19	6 Letter from Fred Daven to Jim Strout
20		20	dated July 20, 2005 27
21		21	7 Letter from Fred Daven to Jim Strout
22		22	ad Steve Nelle dated September 9,
23		23	2005 30
24		24	8 E-mail from Fred Daven to W.
25		25	Higgins, Dan Arana, J. Dravet
Page 3		Page 5	
1	A P P E A R A N C E S	1	dated August 3, 2005 34
2	FOR THE PLAINTIFF:	2	9 PCI COR Log 37
3	OTIS CANLI & IRIKI, LLP	3	10 Letter from James Strout to Ron
4	By: STEVEN L. IRIKI	4	Brookfield dated April 6, 2006 38
5	180 Montgomery Street	5	11 PCI Log of CO's and COR's 45
6	Suite 1240	6	
7	San Francisco, California 94104	7	QUESTIONS WITNESS INSTRUCTED NOT TO ANSWER:
8	(415) 362-4442	8	Is it your understanding that the
9	PERFORMANCE CONTRACTING GROUP	9	language I just read to you
10	By: ROGER LENNENBERG	10	from the subcontract is a
11	Corporate Counsel	11	pay of pay provision? 7 17
12	8015 S.W. Hunziker Road	12	
13	Tigard, OR 97223	13	INFORMATION TO BE SUPPLIED:
14	(503) 603-5345	14	(None)
15	PERFORMANCE CONTRACTING GROUP	15	
16	By: Jon Miklos	16	
17	Senior Vice President	17	
18	16400 College Boulevard	18	
19	Lenexa, KS 66219	19	
20	(913) 310-3377	20	
21	FOR THE DEFENDANTS:	21	
22	PECKAR & ABRAMSON	22	
23	By: RAYMOND M. BUDDIE	23	
24	250 Montgomery Street	24	
25	16th Floor	25	
	San Francisco, California 94104		
	(415) 837-1968		
	DICK CORPORATION		
	By: MICHAEL T. AMBROSO		
	Corporate Counsel		
	P.O. Box 10896		
	Pittsburgh, PA 15236-0896		
	(412) 384-1287		
	ALSO PRESENT:		
	JIM STROUT, Performance Contracting Group.		

2 (Pages 2 to 5)

A006382
FRED DAVEN - July 27, 2006

Page 6	Page 8
<p>1 FRED DAVEN</p> <p>2 having first been duly sworn, was</p> <p>3 examined and testified as follows:</p> <p>4 EXAMINATION BY MR. STEVEN L. IRIKI</p> <p>5 MR. IRIKI: Q. Good afternoon, Mr. Daven.</p> <p>6 First of all, could you please state and spell your name</p> <p>7 for the record.</p> <p>8 A. Fred Daven. D-A-V-E-N.</p> <p>9 Q. Mr. Daven, have you ever had your deposition</p> <p>10 taken before?</p> <p>11 A. Yes.</p> <p>12 Q. How many times have you been deposed before?</p> <p>13 A. Three.</p> <p>14 Q. Do you need for me to go through the ground</p> <p>15 rules governing your deposition today?</p> <p>16 A. I don't think so.</p> <p>17 Q. All right. There is one ground rules I am</p> <p>18 going to go over. You understand that your testimony</p> <p>19 today is under penalty of perjury? Even though we are</p> <p>20 in my conference room today, it's as if you're</p> <p>21 testifying in a court of law. Do you understand that?</p> <p>22 A. Yes.</p> <p>23 Q. Is there any reason why your deposition cannot</p> <p>24 go forward today?</p> <p>25 A. No.</p>	<p>1 Q. Where is their office located?</p> <p>2 A. Alamo, California.</p> <p>3 Q. Can you give me the address, please?</p> <p>4 A. I don't know what the address is.</p> <p>5 Q. Do you remember what street they are on?</p> <p>6 A. I could look at my cards. 3189 Danville</p> <p>7 Boulevard.</p> <p>8 Q. Mr. Daven, what's your home address, please?</p> <p>9 A. 63 Foster Drive.</p> <p>10 Q. What city is that located in?</p> <p>11 A. San Ramon.</p> <p>12 Q. And where did you work before you went to work</p> <p>13 for Trans Can?</p> <p>14 A. Dick Corporation.</p> <p>15 Q. When did you start working for Dick</p> <p>16 Corporation?</p> <p>17 A. May of '04, I believe.</p> <p>18 Q. May of 2004?</p> <p>19 A. Yes.</p> <p>20 Q. When did you leave Dick Corporation?</p> <p>21 A. June of '06.</p> <p>22 Q. When you first started working for Dick</p> <p>23 Corporation, what was your job title?</p> <p>24 A. Director.</p> <p>25 Q. Was that your title when you left Dick</p>
Page 7	Page 9
<p>1 Q. Are you taking any medication that would</p> <p>2 affect your ability to give testimony today or that</p> <p>3 affects your memory?</p> <p>4 A. No.</p> <p>5 Q. Mr. Daven, if you could summarize your</p> <p>6 education for me since high school.</p> <p>7 A. I've got a bachelor of science degree in</p> <p>8 architecture.</p> <p>9 Q. And where did you obtain that degree?</p> <p>10 A. North Carolina State.</p> <p>11 Q. What year did you graduate from North Carolina</p> <p>12 State?</p> <p>13 A. 1977.</p> <p>14 Q. How are you currently employed? Who do you</p> <p>15 work for?</p> <p>16 A. Trans Can Development. T-R-A-N-S, C-A-N.</p> <p>17 Q. And when did you start working for Trans Can?</p> <p>18 A. Tenth of July.</p> <p>19 Q. And what's your position with Trans Can?</p> <p>20 A. Executive vice president and chief operating</p> <p>21 officer.</p> <p>22 Q. What kind of work does Trans Can do?</p> <p>23 A. They are a developer.</p> <p>24 Q. What kind of projects do they develop?</p> <p>25 A. Commercial and retail.</p>	<p>1 Corporation?</p> <p>2 A. Yes.</p> <p>3 Q. What were your duties and responsibilities as</p> <p>4 a director?</p> <p>5 A. Overseeing the San Francisco federal building</p> <p>6 project.</p> <p>7 Q. The project located near the corner of 7th and</p> <p>8 Mission?</p> <p>9 A. Correct.</p> <p>10 Q. That was for the General Services</p> <p>11 Administration?</p> <p>12 A. That's who we were building it for, correct.</p> <p>13 Q. Where did you work before you worked for Dick</p> <p>14 Corporation?</p> <p>15 A. Swinerton Builders.</p> <p>16 Q. When did you start working for Swinerton?</p> <p>17 A. I would say around 2002.</p> <p>18 Q. Did you work for them until 2004?</p> <p>19 A. Yes.</p> <p>20 Q. What was your job title with Swinerton when</p> <p>21 you started?</p> <p>22 A. Project executive.</p> <p>23 Q. What was your job title when you left</p> <p>24 Swinerton?</p> <p>25 A. Same.</p>

3 (Pages 6 to 9)

EXHIBIT 2

Page 1 of 1

James R. Dravet*PCI*

From: Daven, Fred H. [fhdaven@dickcorp.com]
Sent: Wednesday, August 03, 2005 11:56 AM
To: wlhiggins@dickcorp.com
Cc: Dan Araña; jrdravet@dcmsx03.dickcorp.com
Subject: PCI

Bill - Have you had a chance to speak to the PCI VP about the project? If not, please make this request to do so a priority.

Issues that need to be discussed are;

- 1) Center Core Framing - They are refusing, (verbally) to perform the work unless a change order is issued. This is a \$1.8MM impact to them. It is a potential delay to the project. Must be resolved by next week.
- 2) Interior design/engineering support not being performed in an adequate or timely manner. This has schedule implications.
- 3) The Cement Board Panels - PCI is using a lame excuse about having attachment clip issues resolved prior to ordering the units. (must come from Switzerland). They are balking at every opportunity. Their upper management needs to better support this project and plumb up the project staff/management. (PCI will now have to expedite the units and fly them here).

To provide you some history; PCI met with me twice and issued a letter asking that their contract be terminated. They stated that they are losing over \$2MM on the project. I informed them that I will not do that. I've been working close with them, helping to support their efforts at every turn. They need to get off the dime.

We may need to look at releasing them from their contract and notifying their bonding company. I have a good sub ready to step in and complete the project. I know this is a last resort, but we need to be prepared to do whatever it takes to get the project completed.

I've worked with PCI on other large and complex projects. They have always performed well and they were never high maintenance. Because we didn't quite handle things correctly at the start of the project and because the subs are financing the project, their taste has really soured. We need them to step up and start getting into gear.

I'm holding off speaking to them in a more stern manner until you speak with their execs. Please let me know your plans.

Thanks

Fred Daven
 Director

Dick/Morganti JV
 Office - 415.522.1320
 Cell - 415.760.7753

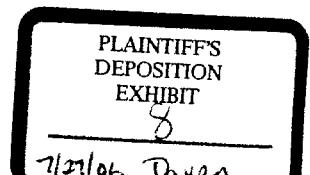


EXHIBIT 3

A006382
FRED DAVEN - July 27, 2006

Page 34		Page 36	
1	and then split the remainder with PCI?	1	A. Yes.
2	A. I believe that's what it says.	2	Q. Prior to the GSA project, had you worked on
3	Q. Do you recall, did PCI accept this proposal?	3	any projects with Jim Strout before?
4	A. I don't believe they did.	4	A. No.
5	Q. Who ended up doing the in-fill framing work, do you remember?	5	Q. The sentence, the paragraph goes on to read,
6	A. Yes. We hired a separate subcontractor.	6	"Because we didn't quite handle things correctly at the
7	Q. Is that Burger Brothers?	7	start of the project and because the subs are financing
8	A. Yes.	8	the project, their taste has really soured. We need
9	Q. Did they do the work on a T and M basis?	9	them to step up and start getting into gear."
10	A. Yes.	10	What do you mean "Because we didn't quite
11	Q. To your knowledge, have they finished the in-fill framing?	11	handle things correctly at the start of the project"?
12	A. I haven't been on the project since October, I don't know.	12	A. There is documentation from the subs and our documentation supporting them.
13		13	Q. What were you referring to, though?
14	(E-mail from Fred Daven to W. Higgins, Dan Arana, J. Dravet dated August 3, 2005 marked Plaintiff's Exhibit No. 8 for identification.)	14	A. It was a general statement with the problems that we have had with documentation from subcontractors, and us being able to process the documentation and try to get some resolution to the issues.
15		15	Q. When you say processing the documentation, are you including change orders in that?
16		16	A. They could be change order proposals, whatever it is, issues of design, it doesn't matter.
17		17	Q. You go on to say that, "because the subs are financing the project, their taste has really soured."
18		18	A. Yes.
19	MR. IRIKI: For the record, the next exhibit I've marked is Exhibit No. 8, it's a one-page e-mail, it appears to be from Mr. Daven to W.L. Higgins with a CC to Dan Arana and J. Dravet, it's dated August 3, 2005.	19	
20	Mr. Daven, do you recognize this e-mail?	20	
21	A. I'm going through it right now.	21	
22	Q. Take your time, I'm sorry.	22	
Page 35		Page 37	
1	A. Okay.	1	Q. When you say that they are financing the project, do you mean that the subcontractors were being asked to do extra work for which they weren't being paid for?
2	Q. Do you recognize the e-mail?	2	A. Depends on what you call extra work. They were directed to do the work by the GSA, as we were.
3	A. Yes.	3	Q. But the subcontractors, many of them took the position that that work was extra work?
4	Q. Is this an e-mail that you sent on or about August 3, 2005?	4	A. They took the position that it was extra work.
5	A. More than likely.	5	Q. And the GSA wasn't paying for that work, correct?
6	Q. Who is W.L. Higgins?	6	A. The GSA believed there was no entitlement.
7	A. Our COO.	7	Q. In turn, Dick/Morganti wasn't paying the subcontractors for that work?
8	Q. And who is Dan Arana?	8	A. We were passing down the directives to the subcontractors as our contract states it.
9	A. He is senior vice president.	9	Q. To your knowledge, in taking that position, was Dick/Morganti relying on the pay or pay provisions in its contract with its various subcontractors?
10	Q. Of Dick Corp?	10	A. Not to my knowledge.
11	A. Dick Pacific.	11	Q. All right. Why don't we take a break, a short break.
12	Q. And who is J. Dravet?	12	(Off the record.)
13	A. Project manager.	13	(PCI COR Log marked Plaintiff's Exhibit No. 9 for identification.)
14	Q. For Dick Corp?	14	
15	A. Yes.	15	
16	Q. He was a project manager for the GSA project?	16	
17	A. Yes.	17	
18	Q. And the second to the last paragraph, you say, "I've worked with PCI in other large and complex projects. They have always performed well and they were never high maintenance." Do you see that?	18	
19		19	
20		20	
21		21	
22		22	
23		23	
24	Q. Were you referring to the Franchise Tax Board project in this paragraph?	24	
25		25	

EXHIBIT 4

A006382

FRED DAVEN - July 27, 2006

Page 38	Page 40
<p>1 MR. IRIKI: We will go back on the record. 2 I have marked as the next exhibit Exhibit 3 No. 9, a four-page document on Dick/Morganti stationery 4 and it's entitled PCI COR log.</p> <p>5 Q. Mr. Daven, do you recognize this document? 6 A. Not generally, no.</p> <p>7 Q. Do you recall seeing any change order logs 8 that Dick/Morganti had generated summarizing change 9 orders submitted by PCI? 10 A. I may have.</p> <p>11 (Letter from James Strout to Ron 12 Brookfield dated April 6, 2006 13 marked Plaintiff's Exhibit No. 10 14 for identification.)</p> <p>15 MR. IRIKI: For the record, I've marked as the 16 next exhibit Exhibit No. 10, a four-page document. The 17 first page is a letter from the James Strout to Ron 18 Brookfield, it's dated April 6, 2006.</p> <p>19 Q. First of all, Mr. Daven, do you recognize this letter? 20 A. No, I don't.</p> <p>21 Q. You never received a copy of this letter? 22 A. I never saw it.</p> <p>23 Q. Okay. In April of 2006, do you recall PCI 24 ever taking the position that Dick/Morganti wasn't 25 submitting their change order proposals to the owner?</p>	<p>1 MR. IRIKI: Understood. 2 Q. I am asking in general. 3 A. Developing a claim for the subcontractors 4 against GSA.</p> <p>5 Q. And is that what you worked on until you left 6 Dick Corporation in June of 2006? 7 A. Correct.</p> <p>8 Q. To your knowledge, did any part of that claim 9 involve any work by PCI? 10 A. Not at that time.</p> <p>11 Q. Mr. Daven, I am going to go back to something 12 you touched upon earlier in your testimony. I believe 13 you indicated that you have been deposed approximately 14 three times before; is that correct? 15 A. Correct.</p> <p>16 Q. The first time you were deposed, do you recall 17 when that deposition took place? 18 A. I would say late '70's.</p> <p>19 Q. Do you remember what that case involved? 20 A. No, I don't.</p> <p>21 Q. Were you a party to the lawsuit? 22 A. Yes.</p> <p>23 Q. Do you remember generally what type of case it 24 was? 25 A. I think it was the client that owed me money.</p>
Page 39	Page 41
<p>1 A. I wasn't on the project at that time. 2 Q. All right. Were you still working for the 3 Dick Corporation in April of 2006? 4 A. Yes.</p> <p>5 Q. Where were you located? 6 A. Pleasanton.</p> <p>7 Q. Which project were you working on? 8 A. I wasn't working on a project.</p> <p>9 Q. What were you doing? 10 A. I was developing a claim.</p> <p>11 Q. Which claim were you developing? 12 A. Our claim against GSA.</p> <p>13 Q. On the GSA building? 14 A. Yes.</p> <p>15 Q. When was the last time you worked at the 16 project site? 17 A. I would say September of '05.</p> <p>18 Q. September of '05, did you leave to go to 19 Dick's offices in Pleasanton, did you say? 20 A. Yes, we established an office there.</p> <p>21 Q. When you began working in the Pleasanton 22 office in September of '05, what did you work on? 23 MR. BUDDIE: I am not going to let you ask any 24 specific questions about anything that invades 25 attorney/client or attorney work product privilege.</p>	<p>1 Q. So you sued the client? 2 A. Yes.</p> <p>3 Q. The second time you were deposed, when was 4 that? 5 A. The second and third were with Swinerton.</p> <p>6 Q. The second deposition when you were with 7 Swinerton, did that concern a particular project? 8 A. The Franchise Tax Board.</p> <p>9 Q. Swinerton was the general contractor on that 10 project? 11 A. Correct.</p> <p>12 Q. Was Swinerton involved in litigation on that 13 project? 14 A. I believe so.</p> <p>15 Q. The third time you were deposed, did that 16 involve a particular project? 17 A. The same one.</p> <p>18 Q. Mr. Daven, when you worked on the GSA project, 19 when you first started working on the project, do you 20 remember if the project was behind schedule? 21 A. I don't remember if it was behind schedule at 22 that time or not. Or if it was, it's not something that 23 I concentrated on at that point.</p> <p>24 Q. When you left the project, do you recall that 25 the project was behind schedule?</p>